Supreme Court, U.S.
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No. 94-1911

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MADELINE O. ROBINSON,
Petitioner

v.

ROOSEVELT BENTON, ET. AL.,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the First Circuit (the "First Circuit") err in affirming the United States District Court for the District of Rhode Island's (the "District Court") entry of summary judgment on the Petitioner's claim of discriminatory retaliation due to the absence of any causal connection between the protected activity and adverse employment action?

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STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-3(a) provides:

> (a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner's *Pro Se* Complaint alleged violations of 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964 as amended ("Title VII"), and violations of the First, Fifth and Fourteenth Amendments to the United States Constitution, claiming sex discrimination and retaliation based upon the Respondents' failure to transfer her to Classical High School ("Classical") and appoint her English Department Chair at Classical in the Fall of 1990. In response to Respondents' Motion for Summary Judgment, Petitioner waived her claim of sex discrimination with respect to the transfer claim. Judgment entered in favor of the Respondents as a result of their Motion for Summary Judgment on the grounds that there were no genuine issues as to any material fact and, as a matter of law, Petitioner had failed to establish a *prima facie* case of sex discrimination or retaliation. Thereafter,

Petitioner appealed the judgment to the First Circuit on the claim of retaliation only.

The First Circuit, in a *per curiam* one paragraph opinion, affirmed the judgment below on the grounds that Petitioner failed to prove a *prima facie* case of retaliation by failing to show a causal connection between the protected activity and the adverse employment action.

Many of the statements of fact in Petitioner's Statement of the Case are irrelevant with respect to the issues raised herein and, therefore, are not individually addressed by Respondents. The facts relevant to the issues on appeal are not in dispute and as discussed further herein, demonstrate that the First Circuit did not err in affirming the District Court's grant of summary judgment.

Petitioner is a tenured English teacher in the Providence, Rhode Island, public schools, having taught there since 1967. In June, 1979 as a result of numerous complaints from students, parents and the administration at

Classical, where she was teaching, Petitioner was involuntarily transferred to the Roger Williams Middle School pursuant to the Collective Bargaining Agreement by and between the School Board of the City of Providence (the "Board") and the Providence Teachers Union Local 958, American Federation of Teachers AFL-CIO (the "Union") of which Petitioner is a member.

Shortly thereafter, Petitioner filed a grievance with the Union, and in July, 1979 filed a Charge of Discrimination with the Rhode Island Commission for Human Rights ("RICHR") and the Equal Employment Opportunity Commission ("EEOC"), claiming that the transfer was in retaliation for a September, 1978 Charge of Discrimination she previously filed with the same agencies. In February, 1980, the EEOC notified the Petitioner that it found no probable cause and issued a right to sue letter. Petitioner then filed suit in the District Court in September, 1980, claiming that the involuntary transfer violated her right under

Title VII and the First and Fourteenth Amendments to the United States Constitution. In April, 1982 the District Court found against Petitioner on all her claims.

Petitioner subsequently appealed the April, 1992 adverse decision to the First Circuit. On August 31, 1983, the First Circuit issued its decision, affirming the District Court's finding that the transfer was neither the result of discrimination nor in violation of the United States Constitution.

After being transferred to Roger Williams Middle School in 1979, Petitioner made a request for a sabbatical to pursue her doctorate degree. This request was granted and Petitioner was given a paid sabbatical for the second semester of the school year, February to June, 1980. In the Fall of 1980, Petitioner, having been placed on a transfer list at her request, was transferred to Central High School pursuant to the Collective Bargaining Agreement. Petitioner continued to maintain her name on the transfer list for

transfer to Classical; however, her name had not come to the top of the list at that time. Petitioner continued to teach at Central and by her own admission received very good support from her principal. During Petitioner's tenure at Central, she was also given numerous approvals and praise for extracurricular seminars, additional instructional materials and materials for the school newspaper. In the Fall of 1988, Petitioner was granted a second paid sabbatical to continue pursuit of her doctorate in English.

During the Summer of 1990, Petitioner requested transfer from Central to Classical and also made application for English Department Chair. Although Petitioner's name was now at the top of the transfer list, the Superintendent exercised his discretion pursuant to the Collective Bargaining Agreement and refused to transfer Petitioner in light of her prior history at Classical resulting in the involuntary transfer. The transfer to Classical was given to a

female teacher, the next name on the transfer list. The Department Chair was granted to a male teacher.

Petitioner then filed a Charge of Discrimination with the EEOC and the RICHR for her failure to be transferred to Classical and be appointed English Department Chair. Petitioner claimed, *inter alia*, that the transfer and Department Chair denials were in retaliation for the prior charge of discrimination filed in 1979. On September 30, 1992, the EEOC issued its determination that the evidence obtained during its investigation did not establish a violation of Title VII.

As discussed previously herein, Petitioner thereafter filed a *Pro Se* Complaint which resulted in the District Court's grant of summary judgment on the grounds that Petitioner failed to establish *prima facie* cases of sexual discrimination and retaliation, subsequently affirmed by the First Circuit. In this Petition, Petitioner seeks review of the First Circuit decision. A review of relevant authorities and

the facts of this case, reveals that the First Circuit did not err and that certiorari should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

In Retaliation Based Employment Discrimination Claims, Plaintiff Must Establish A *Prima Facie* Case, Including A Causal Connection Between The Protected Activity And The Adverse Employment Action.

Petitioner suggests that this Court establish a rule identifying the period of time between the protected employment activity and the adverse employment action, suggesting that courts should look to the end of the protected activity and the first instance of retaliation as the end point. Based on such a rule, Petitioner suggests that the lower court erred in affirming the grant of summary judgment. Such suggestion is totally without merit.

A. Petitioner's Argument Concerning Retaliation Was Not Raised In The Lower Court.

Petitioner suggests that the time period to be examined for purposes of the retaliation claim is the period between August 31, 1983 (at which time the First Circuit affirmed the Disctrict Court's ruling that Petitioner's 1979 Charge of Discrimination was without merit) and September, 1984 (when Petitioner claims she was denied a transfer to another school), thereby establishing a causal connection between the protected activity and the adverse employment action. However, Petitioner's Complaint only alleges retaliation resulting from conduct of the Respondents in the Fall, 1990, namely, the denial of Petitioner's transfer and English Department Chair requests. Nowhere in the District Court action did Petitioner plead a claim based upon action by Respondents in 1984. Petitioner only alleged wrongdoing

based upon conduct occurring in 1990.[1]

It is established that Federal Courts of Appeal will not consider issues not raised or passed on by the lower court. J & S Construction Co., Inc. v. Travelers Indemnity Company, 520 F.2d 809 (1st Cir. 1975). In Singleton v. Wulff, 428 U.S. 106 (1976), this Court elaborated on this general rule:

> [T]his is 'essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, [the opposing party] would, or

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[1] Petitioner's suggestion that the requirement that an issue be raised at the lower court level in order to be preserved for appellate review is satisfied by reference to Petitioner's deposition testimony is totally unfounded. The deposition testimony mentioning action in 1984 was never made a part of Petitioner's Complaint nor did Petitioner ever raise a claim based on action by Respondents in 1984.

> could, offer ..., but this is only because [it] has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, [the opposing party] should have the opportunity to present whatever legal arguments he may have ... 428 U.S. at 120, *quoting* Hormel v. Helvering, 312 U.S. 552, 556 (1941).

Petitioner's failure to allege any retaliatory action by Respondents in 1984 is a bar to review in this Court.

B. Petitioner's New Retaliation Claim Is Time Barred Due To The Lack of Required Administrative And Court Filings.

More importantly, however, even if a claim of retaliatory action by Respondent in 1984 was made in the District Court litigation, it would be time barred as no administrative or court filings were timely made. In Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990), the First Circuit ruled that failure to file the required administrative filing was a bar to an action under Title VII: "Title VII requires

exhaustion of administrative remedies as a condition precedent to suit in federal district court. Jensen at 520, *citing* Brown v. General Services Admin., 425 U.S. 820, 832 (1976). Lastly, even assuming, *arguendo*, the filing of a timely claim, the requisite causal connection would be lacking as a matter of law in light of the 13 month period (August, 1983 to September, 1984), as discussed further herein.[2]

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[2] Moreover, assuming, *arguendo*, Petitioner had timely filed the required administrative filings and asserted a retaliation claim in a civil action based upon conduct which occurred in 1984, accepting Petitioner's logic, the period of time for retaliation claim purposes would be computed from April, 1982, when the District Court entered judgment against Petitioner and not the affirmance of the judgment by the First Circuit. Inasmuch as the First Circuit review is an appellate review of the record established in the District Court, without opportunity to present evidence of a defendant's subsequent actions which might affect his position in the pending litigation as suggested by Petitioner, accepting Petitioner's logic, Respondents could "safely" discriminate once the record was closed at the District Court level. Therefore, the period April, 1982 to September, 1984, the date of the first transfer denial, as a matter of law, would fail to meet the causal connection element of a retaliation claim.

C. **There Is No Causal Connection Between The Protected Activity And The Adverse Employment Action.**

The First Circuit affirmed the District Court's finding that Petitioner failed to establish the requisite causal connection between the protected activity, her 1979 Charge of Discrimination, and the adverse employment action taken approximately 11 years later, the transfer and English Department Chair denials. Petitioner correctly identified District Court and First Circuit opinions which discussed the elements of a retaliation claim, all of which correctly and consistently state that in order to prevail, the moving party must show (1) protected participation or opposition under Title VII known by the alleged retaliator, (2) an employment action or actions disadvantaging persons engaged in protected activities, and (3) a causal connection between the first two elements that is a retaliatory motive playing a part in the adverse employment actions.

The cases cited by Petitioner involve holdings as a matter of law of the absence of the requisite causal connection based upon a 19 month, 33 month, and 9 month period between the protected activity and the adverse employment action. See, Morgan v. Massachusetts General Hospital, 712 F. Supp. 242, 255 (D.Mass. 1989), Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st Cir. 1988), and Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991), respectively. Likewise, the First Circuit, in affirming the District Court's entry of summary judgment, affirmed the holding that the 11 year period did not meet the requirement of a causal connection between the protected activity and the adverse employment action.

Moreover, the absence of a retaliatory motive evidenced by the period of duration between the protected activity and the adverse action was underscored by the favorable actions taken by the Respondents during the 11 year period, including two paid sabbaticals in order for

Petitioner to pursue her English doctorate, approval for student publications and commendations therefor, and by Petitioner's own deposition testimony, substantial support in her teaching efforts from her principal and students. As the First Circuit stated, the 11 year period between Petitioner's protected conduct and the alleged retaliatory action, belies any inference of retaliatory animus in this case. Moreover, the actions of the Respondents are totally at odds with any retaliatory motive.

Petitioner urges this Court to establish a rule setting forth the way in which the period of time between the protected activity and the retaliation should be determined and identifying a clear line as to what period of time constitutes a causal connection between the two. These suggested rules are neither necessary nor appropriate to a claim of retaliation and applied to the facts of this case, have no bearing on the issue of liability. The statute and case law are clear: It is unlawful for an employer to discriminate

against any employee because he ". . . has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Calculation of the period of time between the protected activity and the adverse employment action will turn upon the facts of a particular case, as will the requirement of a causal connection. Did the moving party file a charge of discrimination or testify at a proceeding at a charge of discrimination or participate in an investigation? If so, the period of time for a retaliation claim begins with such activity. Moreover, is there a causal connection that there is a retaliatory motive between the activity and the adverse employment action?

In the facts herein, the First Circuit correctly affirmed the District Court's ruling of the absence of causal connection based upon 1) the 11 year period between the filing of the charge of discrimination and the adverse employment action in 1990, as alleged in Petitioner's

Complaint, and 2) the favorable action taken by the Respondents with respect to Petitioner during that same period. As a matter of law, Petitioner failed to establish a causal connection that is a retaliatory motive resulting in the transfer and English Department Chair denials in 1990, due to the filing of the Charge of Discrimination in 1979.[3]

CONCLUSION

It is clear from the facts and law cited herein that the decision of the First Circuit is not in conflict with any other

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[3] In Section III of Petitioner's Writ for Certiorari, Petitioner claims that the First Circuit erred in affirming the lower court's grant of summary judgment, suggesting that once there is a showing of a *prima facie* case and rejection of a defendant's proffered reasons for a legitimate business purpose, the trier of fact must then decide the ultimate fact of intentional discrimination and the motion for summary judgment should have been denied. Such argument is inapposite. In the facts at bar, by failing to prove a *prima facie* case of retaliation, the Court did not reach the issue of whether the Respondents articulated a legitimate nondiscriminatory basis for the adverse employment decision. It is only when both prongs are met that the fact finder is then allowed to determine whether the action was the result of intentional discrimination.

Circuit. Moreover, the decision of the First Circuit is not in error, the Petition for Writ of Certiorari should be denied and the judgment of the First Circuit affirmed.

Respectfully submitted,

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